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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1974

No. 73-6848

JOHN LEE BOWEN,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

BRIEF AMICUS CURIAE OF GILBERT BRYANT FOERSTER

BASIS FOR FILING AND INTEREST OF AMICUS CURIAE

Amicus Gilbert Bryant Foerster has requested and received written consent to the filing of this Brief *Amicus Curiae* from both counsel for Petitioner Bowen and the Solicitor General on behalf of the United States. Filing of the Brief is thus premised on the consent of all parties pursuant to Rule 42(2) of this Court. The original written consents of the parties have been filed with the Court; copies are set forth in Appendix A.

Amicus Foerster has a Petition for Writ of Certiorari pending in this Court, No. 73-1856, seeking review of his conviction for violation of Title 21 U.S.C.

§176a. The conviction was based on evidence found as the result of a search of a private vehicle on May 1, 1970, without cause or founded suspicion, which took place at a permanent immigration checkpoint located seventy miles north of the Mexican border on a major interstate highway running between San Diego and Los Angeles, two large metropolitan United States cities. The checkpoint in question has been held not to be functional equivalent of a border, *U.S. v. Morgan,* No. 73-1669 (CA 9, 6-14-74).

A previous Petition for Certiorari filed by *Amicus Foerster* was granted and his conviction was vacated for reconsideration in light of *Almeida-Sanchez v. U.S.,* 413 U.S. 266, *Foerster v. U.S.,* 413 U.S. 915. Upon reconsideration the Ninth Circuit affirmed *Amicus Foerster's* conviction on the basis of *Bowen,* the case under consideration, which held that the doctrine of *Almeida-Sanchez* applied to permanent checkpoint searches, but which limited relief to searches occurring after June 21, 1973.

Thus, *Amicus Foerster's* case raises the same issue as *Bowen,* namely, what standards govern immigration searches at permanent checkpoints. Because the search of *Amicus* occurred at a checkpoint which may possess characteristics different from those in *Bowen,* which characteristics may affect decisions as to the reasonableness of the two searches, consideration of *Amicus Foerster's* case will help decide the issues before the Court.

Amicus is aware that certiorari has been granted not only in *Bowen,* but in *U.S. v. Ortiz,* No. 73-2050 and

U.S. v. Brignoni-Ponce, No. 74-114. In each of these cases, the Government will be asserting that this Court's retroactivity doctrine should limit the application of the Fourth Amendment principles applied in *Almeida-Sanchez* and apparently applicable in *Bowen*. *Amicus* wishes to advise this Court as to why no retroactivity issue is properly present, and to call to the Court's attention the undesirable consequences which would flow from a misapplication of that doctrine.

SUMMARY OF ARGUMENT

The *Bowen* case, and that of *Amicus Foerster,* require that this Court determine whether particular searches meet the Fourth Amendment's standard of reasonableness. Because these searches occurred at permanent immigration checkpoints, and because the Government claims that normal Fourth Amendment rules should not apply at such checkpoints, it is necessary to examine such checkpoints and the Government's behavior at them.

I

An examination of the nature and function of permanent checkpoints, the Government's behavior at them, the Government's needs, and the invasions of privacy of citizen travelers occurring at such checkpoints shows that permanent checkpoint searches are not *per se* reasonable. When such checkpoints are not at the border or its functional equivalent, cause must be required to justify a search. If the checkpoint is

within a zone which is a reasonable distance from the border (the zone being variable depending on conditions), then an appropriate resolution of the co-equal and competing constitutional interests would be to permit stops and brief interrogations without cause, but to require cause for a *search*. Depending on conditions, a founded suspicion might constitute sufficient cause to justify a search.

In any event, the search of *Amicus Foerster* was not reasonable.

II

There is no justification for failing to apply the normal Fourth Amendment standards which were applied in *Almeida-Sanchez v. U.S.*, 413 U.S. 266, and which should be applied in *Bowen*, to all cases presently on direct review. *Almeida-Sanchez* did not, and the decision in *Bowen* need not, enunciate a new constitutional rule, overrule any past case of this Court, or make a sharp break with the past. The doctrinal basis of *Almeida-Sanchez* shows no more than the usual application of Fourth Amendment principles; the result therein was clearly foreshadowed by numerous decisions of this Court. The disposition of *Bowen* and of *Foerster* should be governed by similar doctrine. There is thus no justification for any application of this Court's retroactivity doctrine.

Any limitation of *Almeida-Sanchez* or *Bowen* to prospective application will adversely affect this Court's reputation for principled adjudication.

ARGUMENT

I

A SEARCH FOR ALIENS AT A PERMANENT VEHICULAR CHECKPOINT WHICH IS NEITHER AT THE BORDER NOR ITS FUNCTIONAL EQUIVALENT IS NOT PER SE REASONABLE AND THEREFORE MUST BE BASED UPON CAUSE TO BE CONSTITUTIONAL.

A.

The legality of every search case turns on its own facts. No ready talisman signals whether a search is reasonable, but this does not mean that the issue is to be decided by the proclivities of the Justices on the Court. Instead, the Court must develop criteria for evaluating the reasonableness of each search by examination of the factual setting of the search considered.

The search at bar, as well as that of *Amicus Foerster,* occurred at a permanent immigration checkpoint. As the government appears to claim that searches at such locations should be immune from the normal Fourth Amendment standards, it is necessary to investigate the setting of such searches.

1. The Government has set up permanent checkpoints in alleged pursuance of its obligation to detect the presence of illegal aliens within the Country. At these checkpoints travelers are stopped and interrogated and their vehicles searched.

2. Not all vehicles passing through the checkpoints are stopped, and not all stopped vehicles are searched.

Bowen v. U.S., ... F.2d .....; Petition for Certiorari of *Amicus Foerster*, p. 8.[1] The Government has never advanced a rational policy governing which vehicles are to be searched. Such policy as apparently governs permanent checkpoint searches was stated in *Amicus'* case as follows:

> Well, our *formal policy*, of course, being close to the international boundary, our past apprehension reports show about 90% of our apprehensions come from Mexican-Americans or Mexican aliens. We pull these people predominantly over. We pull U-haul trucks. We cannot see inside—almost any vehicle that comes through that we cannot observe on the inside as a matter of policy, automatically pull those over.
>
> Vehicles that have the back end unusually low to the ground, indicating an unnecessary or unusual amount of weight in the trunk are often times suspect. Then it is a kind of undefinable thing except based on experience. You have been in the business a long time and some people look a little bit different to you, and they are worth a check, or they may not be, but they may be. So I say it is based a lot on experience and a great deal on what we are looking for. (16-17) (emphasis added) Cert. Pet., pp. 8-9.

There appears not doubt but that the decision to search is based primarily on the predisposition of the officer on duty, and is therefore most often arbitrary.

3. The permanent checkpoint immigration search entails a substantial invasion of the privacy of the

[1]Hereinafter "Cert. Pet."

citizen traveler. Everyone has an expectation of privacy in his automobile, which is often used to carry private and personal possessions, and is fitted with locks to enforce the privacy. The privacy expectation at least equals that within a telephone booth, cf. *Katz v. U.S.,* 389 U.S. 347. United States citizens have little or no expectation of police behavior which is arbitrary or without cause. Further, citizens have no expectation of being searched during domestic travel.

But the impact of a checkpoint search is more than that of an unexpected arbitrary search. Because not everyone, or even a majority of people, are subjected to search, the selected traveler feels the pressures of being subject to close governmental scrutiny. And because he assumes other people think the way he does, he feels belittled and embarrassed because he believes that other persons traveling through the checkpoint, not subjected to search, think that he has been pulled over and searched for some good cause.

The formidable psychological impact of the search is reinforced by its setting. The search occurs on or near the open highway and is often conducted at night, circumstances which lead the traveler to feel insecure and exposed. The traveler is inevitably where he cannot secure witnesses or aid from family or friends, and, probably in most cases, is a long distance from the geographical area most familiar to him.

The permanent checkpoint search is thus significantly different from the house search of *Camara v. Municipal Court,* 387 U.S. 523, where all dwellings

in a given area are subject to inspection and where inspection takes place away from the eyes of strangers.

There is no evidence that the searches are conducted in a polite, non-aggressive manner, if possible. There is no evidence that the detention period occasioned by any search is short. There is no evidence that the reason for the search is explained to the traveler, although it could hardly provide solace to a traveler to find that the government wishes to conduct a search to determine if he is an alien smuggler, or, in other words, a criminal.[2]

4. The government has never made a factual showing that searches without cause are necessary to produce any significant result in terms of apprehending aliens. While the government produces statistics on the number of illegal aliens detected, we are not told how many aliens are caught as the result of stops and interrogations, without search. More importantly, we are not told how many of the searches which produced aliens were in fact based on some cause such as a reasonable suspicion. Examination of the cases before the circuit courts indicates that cause often develops rapidly after a stop and detention.[3]

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[2]Immigration searches are not administrative. Officers are seeking to identify smugglers. A pure administrative search would be one for people with smallpox, who will not be arrested because of the disease. Cf. *Robinson v. California*, 370 U.S. 660.

[3]*Fernandez v. U.S.*, 321 F.2d 283 (9th Cir. 1963); *Renteria-Medina v. U.S.*, 346 F.2d 853 (9th Cir. 165); *U.S. v. Avery*, 428 F.2d 1159 (9th Cir.) *Cert. denied*, 400 U.S. 903; *Duprey v. U.S.*, 435 F.2d 1276 (9th Cir. 1970); *U.S. v. Aranda*, 457 F.2d 761 (9th Cir. 1972); *Roberts v. U.S.*, 470 F.2d 858 (9th Cir. 1972); *U.S. v. Campos*, 471 F.2d 296 (9th Cir. 1972); *U.S. v. Barrow*, 472 F.2d 1215 (9th Cir.), *cert. denied*, 413 U.S. 920 (1973); *U.S. v. Anderson*, 468 F.2d 1280 (10th Cir. 1972); *U.S. v. McCormick*, 468 F.2d 68 (10th Cir. 1972).

The evidence in *Amicus Foerster's* case was that seventy-five percent of the aliens apprehended at the checkpoint in question were found through conversations with vehicle occupants. Of the twenty-five percent found through searches, the government failed to indicate if the searches were with or without cause. Cert. Pet., p. 8.

5. No showing has ever been made that the immigration system would not function just as well if the government established permanent checkpoints which were at locations away from the border, but where the probability of a nexus with international travel was high. Under present circumstances, no showing has ever been made that any non-border permanent checkpoint has a strategic location insuring a high probability that it focuses primarily upon international travel.

6. Permanent checkpoints have less justification for their existence than roving stops. Permanent checkpoints interfere with the lives of many more persons than roving stops. Yet fixed locations are the least efficient method for catching violators, for if the criminal knows he may be searched at a specific location, he will avoid it. In other words, the element of surprise present in the roving patrol is missing.

Amicus is unacquainted with the statistics of the checkpoint in *Bowen,* but the California State Highway Department statistics show that in 1970, the year of *Amicus'* arrest, close to eight million vehicles went through the checkpoint at which *Amicus* was searched. (In 1973, the number had increased to over 9.8 million). Testimony of immigration officials in *Amicus'*

case as to the number of vehicles searched varied; the testimony indicated that not less than one-half million and perhaps up to two million cars were searched annually at this checkpoint alone. See Cert. Pet., pp. 7-8. The searches netted approximately 2,100 aliens for the year. *Id.* Again, we do not know how many of the searches which resulted in alien apprehension were with cause.

7. The government has never made a factual demonstration that its problems regarding immigration law enforcement differ significantly from enforcement problems involving other laws such as narcotics, gambling, or organized crime. The government's obligation to prevent narcotics distribution is at least equal to that of its immigration functions. If federal narcotics agents can live with a cause requirement, certainly if the Bureau of customs can, see *U.S. v. Johnson,* 425 F.2d 630, *cert. grtd.* 400 U.S. 900, dismissed under Rule 60(2) on motion of United States, then immigration officers should be able to.

The above discussion demonstrates that searches at permanent checkpoints are not *per se* reasonable, at least where such checkpoints are not at a border or its functional equivalent. It then becomes necessary to determine when searches at non-border checkpoints will be reasonable.

B.

We are confronted here with the all too familiar necessity of reconciling a legitimate need of government with constitutionally protected rights. There can be no question as to the seriousness and legitimacy of the law enforcement problem with

> respect to enforcing along thousands of miles of open border valid immigration and related laws. Nor can there be any question as to the necessity, in our free society, of safeguarding persons against searches and seizures proscribed by the Fourth Amendment. *Almeida-Sanchez v. U.S., supra,* at 275, (Powell, J. concurring).

Government often has a legitimate need to search. The normal reconciliation of the needs of government and the rights of citizens in the Fourth Amendment area is accomplished by requiring the government to demonstrate that it has "probable cause." When government can demonstrate that it has reasonably trustworthy information about facts and circumstances which are "sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed," *Berger v. New York,* 388 U.S. 41, its needs are deemed strong enough to override a citizen's privacy rights.

This Court has always held that any relaxation of normal Fourth Amendment standards must be premised on a governmental showing that exigencies of the situation make the government's course *imperative, Coolidge v. New Hampshire,* 403 U.S. 443. Thus, in *Camara v. Municipal Court, supra,* this Court softened the focus normally required for probable cause because enforcement of the housing laws was impossible otherwise. In *Terry v. Ohio,* 392 U.S. 1, this Court permitted police officers a limited invasion of citizen's privacy rights because there was no other reasonable means of affording personal protection to the officers.

Here, the government has some needs relative to the enforcement of its immigration laws. Necessity is, of course, never a justification for the suspension of Fourth Amendment rights. Justifiable and provable needs may, however, affect the balance to be struck between competing interests. The government can already conduct stops, interrogations and full searches without cause at the border or its functional equivalents. *Almeida-Sanchez v. U.S., supra.* (The government is not limited to borders and airports, for the functional equivalence test certainly encompasses the notion of a flexible zone away from the border, the notion suggested by the minority in *Almeida-Sanchez.* The zone might be quite narrow in California, but quite broad in parts of Texas or Alaska.)

What the government apparently needs the most is to be able to stop travelers and talk to them within reasonable distances from the border. Such evidence as is available indicates, and logic supports, the proposition that most of the effective enforcement comes from use of this tool. There is admittedly a possibility that the government's function will be impaired without the ability to stop and talk to travelers without cause.

As the intrusion on privacy of a mere stop is significantly less than that of a search, it appears that the government should be given this right. The right should be limited to a reasonable distance from the border, which will depend upon circumstances, such as those propounded by Justice Powell in reference to his area warrant notion in *Almeida-Sanchez.* See 413 U.S. 283-4.

Cause should be required for an alien search away from the border because of the serious invasion of privacy of domestic travelers, because the government has not demonstrated any need for a no-cause search right to enforce its laws, and because officers should be held accountable for their behavior if they invade the rights of domestic travelers. Where factors indicate such a course is reasonable, searches may be permitted on a reasonable suspicion supported by articulable facts. This would permit a search, for example, upon an informer's tip or where a car was riding excessively low.

The claim of the government to total search authority, to be exercised thousands of times a day, with no requirement that it justify its actions either before or after the search, is wholly unwarranted. All the government needs, and all it should be permitted is "an escalating set of flexible responses, graduated in relation to the amount of information [it] possess[es]" *Terry v. Ohio, supra,* at 10. The procedure outlined by *Amicus* gives the government the measured response it needs to present day immigration problems.

C.

The facts of *Amicus'* case provide clear focus on why no-cause searches at checkpoints away from the border are not *per se* reasonable. After *Amicus* was stopped at a permanent checkpoint, the official conducting the investigation determined that he and his passenger were United States citizens. The official testified that there was nothing unusual about *Amicus'* vehicle at the time it was pulled over and searched,

there was no reason to believe that either the vehicle or its occupants had ever been outside the United States, and there was no reason to believe that the vehicle contained aliens or contraband. Pet. Cert., p. 10. Thus, the official possessed no facts about *Amicus* or his vehicle which would warrant a belief or raise a suspicion that an offense was being committed.

The place where *Amicus* was searched was seventy miles north of the Mexican border, on a highway on which millions of cars travel annually. The check point is between Los Angeles (the largest city in California and the second largest metropolitan area in the United States) and San Diego (one of the four largest cities in California and a major business and tourist center for the southern part of the state.) See Pet. Cert., p. 7, fn. 5 for further details on these two cities. In addition, between San Diego and the checkpoint are at least ten state beaches and resort towns. *Id.*

Under the circumstances, then, officials had no reason to believe that all, most, or even a high percentage of vehicles going through the checkpoint had recently, or ever, crossed the border. The road is obviously a major domestic artery for vehicular traffic; the checkpoint is far from the border; and the record in *Amicus'* case shows that the concentration of illegal alien traffic in relation to general traffic on the road is very small. Pet. Cert., pp. 7-8.

Thus, the location of the checkpoint discloses no basis on which one could conclude that it would be reasonable to conduct any kind of alien search, much

less one without cause. Understandably, the location has been found not to be the functional equivalent of a border. *U.S. v. Morgan, supra.*

In summary, the government has nothing to put on the scales to balance against the interference with *Amicus'* Fourth Amendment rights.

II

THERE IS NO JUSTIFICATION FOR FAILING TO APPLY THE NORMAL FOURTH AMENDMENT STANDARDS WHICH WERE REITERATED IN ALMEIDA-SANCHEZ v. U.S., AND WHICH SHOULD GOVERN BOWEN v. U.S., TO ALL CASES PRESENTLY ON DIRECT APPEAL.

Introduction

The government is presently arguing that this Court's treatment of non-border searches for aliens should be limited to prospective application. Such an argument can only be premised on the conclusion that *Almeida-Sanchez* has, and *Bowen* will, set forth a new constitutional rule.[4] That conclusion is in error.

A.

In *Almeida-Sanches,* this Court was faced with the question of the legality of a search which took place without probable cause or a reasonable suspicion. This Court did no more than hold that normal Fourth Amendment standards of cause applied to that search. Even the minority treated the case as one in

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[4] *Gosa v. Mayden,* 413 U.S. 665; *Chevron Oil Co. v. Huson,* 404 U.S. 97; *Milton v. Wainwright,* 407 U.S. 371, 381 fn. 2 (Stewart, J., dissenting); *Michigan v. Payne,* 412 U.S. 47; *Williams v. U.S.,* 401 U.S. 97.

which the question was solely that of the reasonableness of the search.

No new doctrine was enunciated by the Court and applied to the search to find it illegal. The majority held the search illegal because *on the facts of the case* no justification was shown for the search; the minority disagreed solely because it felt that "under all the circumstances the stop of petitioner's car was reasonable . . .", *Almeida-Sanchez* at 299, 288-9. That the dispute between the majority and the minority was solely upon the construction of the facts is evident from the fact that even the minority was careful to point out that it was not stating that all searches for aliens pursuant to authority claimed by the government were necessarily legal, *Id.* at 299, fn. 11.

The only "new" proposition in *Almeida-Sanchez* was the assertion by the government that it had a right to search without any reason whatsoever anywhere within one hundred miles of any border, irrespective of geographical, demographic or other characteristics of the place of the search. The rejection of this "extravagant license" which was warranted by neither an enactment of Congress nor any case of this Court, certainly could not be deemed to create a new constitutional principle.

All *Almeida-Sanchez* said in response to the government's broad claims is that it could continue to search without cause at the border or any other place which was very, very much like a border, i.e., its functional equivalent. Otherwise, the government's searches must be premised upon cause.

The fact that the Court permitted searches without cause at the functional equivalent of a border in addition to the border itself did not create a "new" rule; the granting of such search permission was no more than the application of common sense. More to the point, the validation of searches at functional equivalents enlarged the area of search permitted the government; it did not create or enlarge any rights for citizen travelers.

In *Bowen,* and in the case of *Amicus Foerster,* this Court need not announce any new constitutional rule. It need only decide if the searches which took place were reasonable, using, just as in *Almeida-Sanchez,* doctrines which have previously been formulated and applied by the Court. Claims by the government that the rejection of its past practice creates a new rule which should not be applied to cases presently before this and other Courts are fictitious, and should be rejected.

B.

The decision in *Almeida-Sanchez* did not, and the decision in *Bowen* need not, overrule clear past precedent or make a sharp break with the past. The holding of *Almeida-Sanchez* was, and the correct result in *Bowen* is, clearly foreshadowed by a wide range of cases of this Court.

This Court has *never* permitted the government to search members of the general public engaged in domestic activity without cause. Fifty years ago the government sought such authority, but this Court in

Carroll v. United States, 267 U.S. 132, clearly and forthrightly refused to grant that authority. No case has since inhibited the vitality of *Carroll.* Moreover, *Carroll* has been followed in *Brinegar v. U. S.,* 338 U.S. 160; *Dyke v. Taylor Implement Mfg. Co.,* 391 U.S. 216; *Chambers v. Maroney,* 339 U.S. 42, *Husty v. United States,* 282 U.S. 694 and *Scher v. U. S.,* 338 U.S. 160. Even a cursory reading of *Carroll* by the government must have provided it with notice that its overly broad search claims were without merit.

Broad search authority was again sought in *Camara v. Municipal Court, supra* and in *Terry v. Ohio, supra.* Despite the demonstrated needs of the government presented in those cases, this Court required some cause for a search. Here, of course, need has not even been demonstrated.

Cases dealing with domestic automobile searches while not requiring a warrant in all circumstances, have never dispensed with the cause requirement, so as to give the government wholesale search authority for which it need never account. *See Chambers v. Maroney, supra*; *see Coolidge v. New Hampshire,* 403 U.S. 443.

As the Court in *Almeida-Sanchez* noted, no cases of this Court support the government's position. All of the cases have indicated that cause is required in the circumstances and thus have foreshadowed the results which have and should obtain in these search cases.

C.

It is also noteworthy that this Court in deciding *Almeida-Sanchez* did not find the search statute unconstitutional, did not have to place a strained construction upon it, and did not have to place a limiting gloss on its text. 8 USC §1357 provides for vehicle searches for aliens without warrant. Without this statute, it is doubtful if immigration officers could search at all. In other words, it is primarily an *enabling* statute.

The statute provides for *warrantless* searches of automobiles within a reasonable distance from the border. It does not provide for searches without cause.[5] The statute does represent the judgment of Congress that a warrant requirement would seriously impede the enforcement of the immigration laws. Expression of such a legislative judgment, while not final, *Marbury v. Madison,* 1 Cranch 137, seems particularly appropriate with respect to the question of whether a warrant is needed for an automobile search, for that problem has plagued this Court from *Carroll* through *Coolidge.*

But the statute says nothing about the factual basis to be required for an immigration search. This is a question separate and apart from whether a warrant shall be required. It is evident that when Congress wishes to permit searches without cause, it does so specifically and clearly. *Compare* 8 U.S.C. §1357 *with*

[5]In this regard, *Amicus* respectfully but strongly disagrees with the minority's view in *Almeida-Sanchez* but it was the judgment of Congress that searches without probable cause were proper. *Id.* at 294.

18 U.S.C. § 923(g) construed in *U.S. v. Biswell,* 406 U.S. 311 *and* 26 U.S.C. §§ 5146(b), 7606 construed in *Colonnade Catering Corp. v. U.S.,* 397 U.S. 72. The statute in question which enables immigration officials to search does not speak to the basis to be required for searches; it is difficult to perceive how the government can claim that a statutory judgment which never existed has now been radically changed.

While the government's own regulations could not control the disposition of the issues at bar, it is significant that no regulations have been passed governing the factual basis required for alien searches. 8 C.F.R. § 287.1. Failure to pass such regulations strongly indicates that, at one time, the Attorney General read the statute the same way *Amicus* now reads it: no such regulations were passed because Congress did not legislate concerning the basis for immigration searches.

D.

The above argument should amply demonstrate that no issue of "retroactivity" is presented by *Bowen,* or by the case of *Amicus Foerster,* for this Court need do no more than it did in *Almeida-Sanchez*: apply long-standing Fourth Amendment principles to the facts of the cases before it.

Yet the government is arguing that such application would be "retroactive" based on its assertion that lower Federal Court law controls the question of retroactivity, and its further assertion that the Ninth Circuit has had a long standing rule permitting immigration searches without any cause requirement. Neither assertion has merit.

1. The government, in seeking to limit the application of Fourth Amendment principles to immigration searches, is squarely placing in issue the question of which Court is to finally decide how our constitutional principles are to be applied. By arguing that this Court is limited in its application of Fourth Amendment doctrine by the legally incorrect posture formerly taken by a subordinate federal court, the government is asking this Court to withdraw from its position as the ultimate authority regarding and final arbiter of the application of constitutional doctrine.

The searches herein present questions which arise solely in a federal context. Thus, there is no need to consider here a possible disruptive impact upon basic notions of federalism. This Court through its decisions must be the sole source for guidance upon questions of basic constitutional principle. Such a course is clearly appropriate where the lower federal court cases on which reliance is claimed were not based upon *Carroll v. U. S., supra,* nor any of its heretofore cited judicial kin.

2. A review of the lower federal court immigration cases shows that no long standing clear rule which permitted immigration searches without any cause whatsoever existed upon which the government can claim reliance. Rather, a rule requiring searches at non-border locations to be based on cause has long existed, and a brief and recent deviation therefrom has been promptly corrected by this Court.

a. The first case clearly dealing with a stop, interrogation and search for immigration purposes appears to have come before the Ninth Circuit in 1961, *Con-*

treras v. U.S., 291 F.2d 63 (9th Cir. 1961). In that case, an alien was stopped for a routine identity check at a *permanent* checkpoint 72 miles north of the Mexican border. The court held that the initial stop and interrogation were legal without the existence of probable cause. It then addressed itself to the legality of the search. It clearly rejected the argument that the search was a border search:

> We cannot believe that the search can be sustained as a border search. The search was not made at or near the border but 72 miles north of it. *Id.*

The court then held that probable cause was required to justify the search.

The issue next came before the Ninth Circuit in 1963 in *Fernandez v. U.S.*, 321 F.2d 283 (9th Cir. 1963), which concerned a stop, interrogation and search at a *permanent* checkpoint. The court first found 8 U.S.C. §1357 to be constitutional on its face and held the stop and interrogation valid without cause. This did not end the matter for the *Fernandez* court, which found it necessary to further determine "whether the search conducted after the car had been stopped was illegal." In order to answer that question, the court, citing *Carroll v. U.S., supra,* applied the following basic doctrine:

> It is well settled that a valid search of a vehicle moving on a public highway may be had without a warrant, if probable cause for the search exists . . ." *Id.*

The search was held legal because after the stop but before the search, the officer smelled marihuana, which provided him with cause.

Similarly, in *Renteria-Medina v. U.S.*, 346 F.2d 853 (9th Cir. 1965), the court, after validating a stop without cause, found it necessary to determine if probable cause existed for the search.

The above cases make it clear that the rule initially developed permitted stops and interrogations without cause but required cause for a search. Any governmental claim that it has relied upon long standing judicial approval of permanent checkpoint searches without cause is without merit.

b. Commencing in 1970, the Ninth Circuit seriously deviated from its previous position and held valid not only immigration stops and interrogations but also searches without cause away from the border. *U.S. v. Miranda,* 426 F.2d 283 (9th Cir. 1970); *Fumagalli v. U.S.,* 429 F.2d 1011 (9th Cir. 1970). Dicta to the same effect appeared in other cases (in which cause was clearly present before a search took place) *see e.g., Duprey v. U.S.,* 435 F.2d 1276 (9th Cir. 1970). However, *certiorari from this Court was not sought in any of these cases,* nor had it been sought in any prior case where a search took place without cause away from the border.

The very next year, in 1971, the Ninth Circuit decided *Almeida-Sanchez v. U.S.,* 452 F.2d 459 (9th Cir. 1971). Certiorari was sought and granted.

Any governmental claim of long reliance on precedent or approved practice is clearly fictitious, for the doctrine allegedly relied upon by the government enjoyed a life-span of one year. This Court granted certiorari and held such no-cause searches unconstitutional at the first opportunity available to it.

Further, reference to this Court's review powers demonstrates the fundamental weakness of the argument that lower federal court activity can determine how this Court's decisions shall be applied. This Court cannot control which cases come to it; it must await a request for relief by certiorari or appeal. If this Court permits lower federal court behavior to dictate how Supeme Court decisions will be applied, and if significant but erroneous decisions are not sought to be reviewed by litigants, *then this Court will have lost control of the application of its decisions.*

c. It should be noted that the government had other indications that its no-cause search policy would not pass continued close scrutiny.

Several immigration searches came before the Tenth Circuit, which, despite the deviation of the Ninth Circuit, held that stops and interrogations at permanent checkpoints were legal without cause, but examined the facts to determine if probable cause existed for the searches. *Roa-Rodriquez v. U.S.,* 410 F.2d 1206 (10th Cir. 1969); *U.S. v. Anderson,* 468 F.2d 1280 (10th Cir. 1972); *U.S. v. McCormick,* 468 F.2d 68 (10th Cir. 1972).

Lastly, the Ninth Circuit has continually required that customs searches away from the border be premised on reasonable suspicion of some nexus with international travel and some smuggling activity. *Cervantes v. U.S.,* 263 F.2d 800 (9th Cir. 1960); *Alexander v. U.S.,* 362 F.2d 379 (9th Cir.), *cert. denied,* 385 U.S. 977 (1966). The similarity between the functions of customs and immigration officials should have put the

government on notice that its no-cause search practice was unconstitutional.

In summary, then, the doctrine now being applied by the Court is not new; no long standing rule supporting the government's position has ever existed, either in this Court or in the Ninth Circuit (which court, in any event, would not control); any reliance claimed by the government is at least seriously misplaced and at worst nonexistent. Thus, the cases before this Court simply do not present any proper question of "retroactivity", and the appropriate doctrines must be applied to all cases still on review.

E.

Any rule limiting application of the constitutional doctrines of this Court must be carefully applied only where absolutely necessary. A declaration of non-retroactivity results in persons who are similarly situated being subject to unequal treatment by the Court. The litigant may be before the Court first solely because of luck or delay on other similar cases in the lower courts. As no record is made of this Court's certiorari conferences, no one can clearly evaluate why certain cases are chosen for review over others presenting an identical issue. To the extent that no sound reason exists for the choice, or none is discernable, this Court's actions are arbitrary.

Such arbitrary action, if it cannot be totally avoided, must be held to an absolute minimum. The reasons therefore go directly to the basis for this Court's authority. The justification for this Court's existence and the primary reason why it has continued to enjoy its

place as a co-equal branch of government is its firm adherence to principled adjudication. *Desist v. U.S.*, 394 U.S. 244 (Harlan, J., dissenting) The force behind the acts and decisions of the Court is fundamentally a moral force. To the extent that persons similarly situated do not receive equal treatment from this Court, its authority is undermined. Thus, a decision to apply doctrine to one case but not to another presenting the same issue can never be taken lightly by the Court. Such a decision should be reached only for the most compelling reasons. Those reasons are lacking here.

CONCLUSION

For the foregoing reasons, the judgment of this Court should be in favor of petitioner Bowen and *Amicus* Foerster.

Respectfully submitted,

ARTHUR WELLS, JR.,

Attorney for Amicus Curiae.

November 15, 1974.

(Appendix A Follows)

Appendix A

(Letterhead of
Law Offices
Nasatir, Sherman & Hirsch
8383 Wilshire Boulevard, Suite 510
Beverly Hills, California 90211
Telephone (213) 653-3303)
October 18, 1974

Arthur Wells, Jr., Esq.
Wells & Chesney, Inc.
125 Twelfth Street, #110
Oakland, California 94607

Re: U.S.A. v. Bowen; U.S.A. v. Foerster

Dear Art:

This letter will advise you that you have our permission and authorization to file an amicus curiae brief in U.S.A. v. Bowen on behalf of your client, Gilbert Bryant Foerster.

Your assistance will be most welcome.

Very truly yours.

/s/ Michael D. Nasatir
Michael D. Nasatir

MDN:dg

(Letterhead of
Office of the Solicitor General
Washington, D.C. 20530)
October 21, 1974

Arthur Wells, Jr., Esq.
Wells & Chesney, Inc.
125 Twelfth Street - Suite 110
Oakland, California 94607

Re: Bowen v. United States
No. 73-6848, October Term 1974

Dear Mr. Wells:

In response to the request in your letter of October 15, I hereby consent to your filing a brief amicus curiae in the above-captioned case.

Sincerely,
/s/ Robert H. Bork
Robert H. Bork
Solicitor General